

Before M.M.S. Bedi, J.

VIJENDER SINGH—Petitioner

versus

SHAMSHER SINGH—Respondent

CR No. 3699 of 2009

March 27, 2012

Constitution of India, 1950 - Art. 227 - Civil Procedure Code, 1908 - O.6 RL.17 - Plaintiff in possession of property pursuant to agreement to sell dated 6.10.2006 - Entire sale consideration paid - Plaintiff filed suit for permanent injunction for restraining defendant from interfering in his possession - During pendency of suit defendant suffered release deed in favour of sons to frustrate claim - Plaintiff filed application for permission to withdraw suit and file fresh suit for specific performance - Application dismissed by trial court vide order dated 5.5.2008 - Within the next 3 days, plaintiff filed an application under O.6 RL.17 to amend pleadings to include relief of specific performance and for setting aside release deed - Application dismissed - Held - Clearly the application for amendment of pleadings was filed within the limitation period prescribed for a suit for specific performance - Evidence had not commenced - The amendment could have been allowed by the trial Court subject to payment of adequate cost to the defendant- respondent - Revision petition allowed.

Held, that after hearing learned counsel for both the parties and carefully going through the sequence of events in the present case, it appears that the plaintiff- petitioner had sought to withdraw the suit for injunction within period of limitation with liberty to file fresh suit but said permission was declined. Within next three days, the plaintiff- petitioner filed an application for amendment of the plaint to incorporate the plea of specific performance and to challenge the release deed which had allegedly been executed by the defendant with an alleged objective of defeating the rights of the plaintiff to seek specific performance. Moreover, no evidence seems to have been led by the plaintiff- petitioner when the application for amendment was filed.

As held in the judgment of Pankaja's case (supra), there is no straight jacket formula for allowing or disallowing amendment of pleadings, each case depends upon factual background of that case. The jurisdiction to allow or not to allow an amendment is discretionary and it is to be exercised in a judicious evaluation of the facts and circumstances in which the amendment is sought. If permitting of amendment to be made really subserves the ultimate cause of justice and avoid further litigation, the same should generally be allowed, if the amendment does not alter the basic structure of the suit. In the present case, the plaintiff does not seek to incorporate the dispute pertaining to any other property but the subject matter of the property remains same. A subsequent event of execution of release deed dated November 7, 2006 has been sought to be challenged besides seeking 1/6th share in the property in dispute on the basis of an agreement of sale dated October 6, 2006. The amendment was sought within a period of limitation prescribed for specific performance. Moreover, the doctrine of relating back is not strictly applicable to all the amendments as laid down in the judgment of Sampath Kumar Vs. Ayyakonnu and another, (2002) 7 SCC 559. It is always discretionary for the Court to pass an order pertaining to the date with effect from which the amendment would be permissible to safeguard the interest of the opposite party, so far as the plea of limitation is concerned. The trial Court has acted illegally in declining the relief of amendment and causing serious prejudice to the plaintiff. The amendment could have been allowed by the trial Court subject to payment of adequate cost to the defendant- respondent.

(Para 7)

M.M.S. BEDI, J.

(1) Plaintiff- petitioner, feeling aggrieved by the order dated June 3, 2009 dismissing an application under Order 6 Rule 17 CPC filed by the petitioner seeking to incorporate the plea of specific performance in his suit for permanent injunction, has preferred this revision petition invoking jurisdiction of this Court under Article 227 of the Constitution of India. The following factors weighed with the trial Court while dismissing the application:-

- (i) The cause of action for filing suit for specific performance for agreement of sale dated October 6, 2006 had already accrued to the plaintiff when the suit was filed on November 27, 2006,

for permanent injunction to restrain the defendant from interfering in the possession of the plaintiff-petitioner in suit land:

- (ii) Suit of specific performance will require new evidence to be produced by the parties in the present suit which would tantamount to introduction of new cause of action;
- (iii) Issues have already been framed by the Court;
- (iv) The trial has already commenced;
- (v) The plaintiff failed to show his diligence to amend the plaint before commencing of trial.

(2) In order to appreciate, if the amendment really subserves the ultimate cause of justice and avoid further litigation, I had carefully gone through the facts and circumstances of the present case. The plaintiff-petitioner had filed a suit for permanent injunction restraining the defendant-respondent not to interfere in the peaceful possession over the suit land along with an application under Order 39 Rules 1 and 2 CPC claiming that the plaintiff-petitioner had been put in possession on the basis of agreement of sale dated October 6, 2006, which was executed by respondent after taking entire consideration of the land in dispute and during the pendency of the suit, the plaintiff came to learn that defendant had suffered release deed of the land in dispute in favour of his sons to frustrate the claim of the petitioner over the suit land with an ulterior motive. In view of the said circumstances, the petitioner had filed an application for permission to withdraw the suit with permission to file a fresh suit for specific performance but said permission was not granted by the trial Court. In view of permission having been declined, the petitioner filed an application under Order 6 Rule 17 CPC for amendment of the plaint for seeking relief of specific performance and setting aside the released deed along with the relief earlier claimed but the trial Court vide impugned order dismissed the said application. The issues have already been framed in the present case but evidence has not yet been led by the plaintiff.

(3) Learned counsel for the plaintiff-petitioner has contended that once the liberty to withdraw the suit for injunction has been dismissed, it is not possible for the plaintiff-petitioner to challenge the release deed which has been executed during the pendency of the suit by the defendant. The

plaintiff- petitioner claims that pursuant to the agreement of sale he has already been put in possession. The relief of specific performance of the agreement of sale dated October 6, 2006 could have been sought within three years after the cause of action having accrued. The application for withdrawal of the suit was filed with liberty to file fresh suit but said application was dismissed on May 5, 2008. Copy of the order dated May 5, 2008 passed by the trial Court has been placed on record. On May 5, 2008, when the application for withdrawal of the suit came up for consideration, the trial Court passed the following order:-

“Learned counsel for the plaintiff made a statement that he wants to file suit for specific performance. Therefore, present suit may be dismissed as withdrawn with furnishing the file a fresh suit. However, from the perusal of the pleadings, it transpires that on 27.11.06, when the present suit for permanent injunction was filed by the plaintiff, the caused of action to file suit of specific performance had already accrued. Therefore, fresh suit will not lie.

At this stage, learned counsel for the plaintiff has prayed for granting on an adjournment for moving an application for amendment of the pleadings. Not opposed. Now to come up on 1.8.08 for the same.

Sd/-Vani Gopal Sharma,
ACJ (SD), Jind, 5.5.2008”

(4) The issues had been framed on January 2, 2008, the case had been fixed for evidence of the plaintiff on April 8, 2008 whereas the application for amendment was filed on May 8, 2008, after the abovesaid order dated May 5, 2008 had been passed. The endeavour of the plaintiff to withdraw the suit for permanent injunction or to seek the amendment had been made within the period of limitation prescribed for specific performance. The application for amendment was, however, disallowed on June 3, 2009. The relief claimed by the plaintiff- petitioner on the date of application for amendment does not seem to be barred on account of

limitation. Even otherwise, in *Pankaja and another versus Yellappa (D) by LRs and others (1)*, it has been observed as follows:-

“The law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not allow an amendment being discretionary the same will have to be exercised in a judicious evaluation of the facts and circumstances in which the amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straight jacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case.”

(5) While making the abovesaid observations, the Apex Court had taken into consideration the following cases:-

- (i) *L.J. Leach and Co. Ltd. And another versus Messrs Jardine Skinner and Co. (2)*, wherein it had been held that bar of limitation is certainly a factor to be taken into account while exercising discretion to allow amendment but that does not affect the power of the Court to order it if that is required in the interests of justice.
- (ii) *T.N. Alloy Foundry Co. Ltd. versus T.N. Electricity Board and Ors. (3)*, wherein it has been held that application for amendment of pleadings should not be disallowed merely because it is opposed on the ground that the same is barred by limitation.
- (iii) *Ragu Thilak D. Join versus S.Rayappan and others (4)*, wherein it has been held that the relief sought by way of amendment was barred by time is arguable in the circumstances of the case and plea of limitation being disputed could be made a subject matter of the issue after allowing the amendment prayed for.

(1) AIR 2004 SC 4102
 (2) AIR 1957 SC 357
 (3) (2004) 3 SCC 392
 (4) (2001) 2 SCC 472

(6) Learned counsel for the defendant- respondent has relied upon *Vidyabai and Ors. versus Padmalatha and another* (5), wherein it has been held that amendment can be allowed before the commencement of the trial and it can be allowed only if it is necessary to decide real dispute between the parties. The amended provisions of Order 6 Rule 17 CPC after the year 2002 were held to be couched in a mandatory form. Counsel for the respondent has also relied upon *Alkapuri Cooperative Housing Society Ltd., versus Jayantibhai Naginbhai (deceased) through LRs.* (6), in which it was held that the discretionary power to allow amendment can be exercised even if the suit is barred by limitation but an amendment which seeks to alter the basic structure of the suit would be impermissible. Great emphasis was laid on judgment of *Ajendraprasadji Pande and another versus Swami Keshvprakeshdasji N. and others* (7), to contend that when issues are settled and case is set down for recording of evidence amendment of pleadings cannot be allowed.

(7) After hearing learned counsel for both the parties and carefully going through the sequence of events in the present case, it appears that the plaintiff- petitioner had sought to withdraw the suit for injunction within period of limitation with liberty to file fresh suit but said permission was declined. Within next three days, the plaintiff- petitioner filed an application for amendment of the plaint to incorporate the plea of specific performance and to challenge the release deed which had allegedly been executed by the defendant with an alleged objective of defeating the rights of the plaintiff to seek specific performance. Moreover, no evidence seems to have been led by the plaintiff- petitioner when the application for amendment was filed. As held in the judgment of *Pankaja's case (supra)*, there is no straight jacket formula for allowing or disallowing amendment of pleadings, each case depends upon factual background of that case. The jurisdiction to allow or not to allow an amendment is discretionary and it is to be exercised in a judicious evaluation of the facts and circumstances in which the amendment is sought. If permitting of amendment to be made really subserves the ultimate cause of justice and avoid further litigation, the same should generally be allowed, if the amendment does not alter the basic structure of the suit. In the present case, the plaintiff does not seek to incorporate the dispute pertaining to any other property but the subject matter of the property remains same. A subsequent event of execution of release deed dated

(5) 2009 (1) RCR (Civil) 763

(6) 2009 (3) RCR (Civil) 427

(7) 2007 (1) RCR (Civil) 481

November 7, 2006 has been sought to be challenged besides seeking 1/6th share in the property in dispute on the basis of an agreement of sale dated October 6, 2006. The amendment was sought within a period of limitation prescribed for specific performance. Moreover, the doctrine of relating back is not strictly applicable to all the amendments as laid down in the judgment of *Sampath Kumar versus Ayyakonnu and another (8)*. It is always discretionary for the Court to pass an order pertaining to the date with effect from which the amendment would be permissible to safeguard the interest of the opposite party, so far as the plea of limitation is concerned. The trial Court has acted illegally in declining the relief of amendment and causing serious prejudice to the plaintiff. The amendment could have been allowed by the trial Court subject to payment of adequate cost to the defendant- respondent.

(8) The revision petition is allowed. The impugned order dated June 3, 2009 is hereby set aside. The application for amendment filed by the plaintiff is allowed subject to payment of cost of Rs.20000/-. It is ordered that the amendment in the present case will be deemed to have been allowed w.e.f. May 8, 2008, the date when the application for amendment was filed by the plaintiff without prejudice to the rights of the defendant to raise the plea of limitation, subject to payment of cost. Parties will appear before the trial Court on next date of hearing.
